FILED

No. 961252 FEB 10 1997

In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1996

PROFESSIONAL MEDICAL INSURANCE COMPANY; PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION,

Petitioners,

vs.

G. THOMAS MURFF,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 7, 1997

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QUESTIONS PRESENTED

1. Does the McCarran-Ferguson Act permit a federal statute, not specifically relating to the business of insurance, to "invalidate, impair, or supersede" a state statute regulating the business of insurance so long as the negation of the state statute does not "substantially impair" the entire state regulatory scheme, as held by the Eighth Circuit in a decision which exacerbates the clear conflict already existing between the decisions of the First, Fourth, Sixth, Seventh, and Ninth Circuits, with respect to a question which remains unsettled by this Court?

2. Does the McCarran-Ferguson Act permit the federal court to hear Respondent's federal age discrimination claims against Petitioner insolvent insurers, divesting the receivership court of its exclusive jurisdiction over all claims involving the insolvents, and overriding the receivership court's ordered stay of all litigation against the insolvents, pursuant to Missouri's comprehensive scheme for the regulation of the business of insurance?

LIST OF PARTIES AND RULE 29.6 LIST

Professional Medical Insurance Company and Professional Mutual Risk Retention Group, In Liquidation have no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Professional Medical Insurance Company and Professional Mutual Risk Retention Group, In Liquidation (collectively "ProMed") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on October 4, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-10) is reported as *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996). The order of the Court of Appeals denying ProMed's petition for rehearing is unreported (Pet. App. 23). The decision of the United States District Court for the Western District of Missouri dismissing respondent Murff's claim is also unreported (Pet. App. 11-22).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 4, 1996. A petition for rehearing was served on October 17, 1996 and denied on November 13, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND STATE STATUTES INVOLVED

Article III, section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

The relevant section of The McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996), provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

The stay provision of the Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo.Rev.Stat. § 375.1188(1) (1995), provides:

> Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order.

The jurisdictional provision of the Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo.Rev.Stat. § 375.1154(6) (1995), provides:

> All actions herein authorized shall be brought in the circuit court of Cole County or any other

> county where the principal office of the insurer is or was last located, and venue of all proceedings and cases ancillary or related to such actions shall be proper in said court.

The jurisdictional provision of the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. § 626(c)(1) (1996), provides:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . .

STATEMENT OF THE CASE

Professional Medical Insurance Company and Professional Mutual Risk Retention Group (collectively "ProMed") were Missouri domestic insurance companies providing primarily medical malpractice insurance. On February 7, 1994, pursuant to Mo.Rev.Stat. § 375.1165, the Circuit Court of Jackson County, Missouri placed ProMed into rehabilitation at the request of the Director of the Missouri Department of Insurance (Pet. App. 34-37). By order of April 7, 1994, the Circuit Court of Jackson County (the "receivership court") adjudged ProMed insolvent, ordered it into liquidation proceedings, and charged a Special Deputy Receiver with the responsibility of winding up ProMed under the supervision of the receivership court (Pet. App. 38-41).

ProMed was ordered liquidated pursuant to Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo.Rev.Stat. §§ 375.1150 through

375.1246 (the "Insolvency Act"), a comprehensive scheme for regulating the business of insurance, including financially-impaired insurers, in Missouri. The Insolvency Act vests exclusive jurisdiction over actions by or against the insolvent insurer in the state receivership court. The receivership court is charged with effectuating this directive of the Missouri legislature by entry of an appropriate order:

> Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order.

Mo.Rev.Stat. § 375.1188(1).

Pursuant to the directive of Mo.Rev.Stat. § 375.1188(1), the receivership court made the following order:

> All persons, wherever situated, are permanently enjoined and restrained from prosecuting or bringing any action, issuing any process or obtaining any judgment against ProMed or its properties or assets.

(Pet. App. 40 at ¶ 11).

On February 17, 1994, Thomas G. Murff filed a complaint against ProMed in the United States District Court for the Western District of Missouri, Western Division. Mr. Murff, a resident of Missouri, was a former employee of ProMed who claimed that he was discriminated against by ProMed on the basis of his age. His complaint

alleged federal and state causes of action based on violations of the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. § 621, *et seq.*, and the Missouri Human Rights Act ("MHRA"), Mo.Rev.Stat. § 213.010, *et seq.* (Pet. App. 11). Murff asserted that the District Court had jurisdiction over his claims pursuant to 28 U.S.C. § 1331; and also invoked 29 U.S.C. § 626(c)(1) which grants jurisdiction over ADEA claims to "any court of competent jurisdiction".

On July 27, 1994, ProMed's liquidator moved pursuant to Fed.R.Civ.P. 12(b)(1) for dismissal of Murff's claim, with prejudice, on jurisdictional grounds. The ProMed Liquidator argued that, pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) and Mo.Rev.Stat. § 375.1188(1), exclusive jurisdiction over the claim lay in the receivership court and, therefore, the District Court was not a "court of competent jurisdiction" to adjudicate Murff's claim. (Pet. App. 12). The District Court granted ProMed's motion to dismiss on August 29, 1994 (Pet. App. 11-22).

Murff appealed to the United States Court of Appeals for the Eighth Circuit arguing that the ADEA precluded a jurisdictional dismissal of his claim. On October 4, 1996, the Eighth Circuit reversed the decision of the District Court and remanded the case for further proceedings, directing the District Court to consider the propriety of granting a stay. *Murff*, 97 F.3d at 293. (Pet. App. 1-11).

ProMed timely filed with the Court of Appeals a petition for rehearing, which the court denied on November 13, 1996 (Pet. App. 23). On November 27, 1996, the Court of Appeals granted ProMed's motion for a stay of

that court's mandate pending the filing of this petition for a writ of certiorari (Pet. App. 24). On January 7, 1997, the Court of Appeals extended the stay of mandate until February 11, 1997 (Pet. App. 25).

REASONS FOR GRANTING THE WRIT

First, the decision of the Eighth Circuit determines an important and substantial question of federal law which has not been, but should now be, settled by this Court. In the absence of controlling authority, the Eighth Circuit in *Murff* further expands a division among the Courts of Appeals regarding the manner in which to apply the third prong of the test articulated in *United States Dep't. of Treasury v. Fabe*, 508 U.S. 491 (1993), to determine whether a federal statute impairs, invalidates, or supersedes a state law regulating the business of insurance within the meaning of the McCarran-Ferguson Act. This Court has never ruled on the question.

The Eighth Circuit held that the congressional grant of concurrent jurisdiction over ADEA claims divested the Missouri receivership court of its exclusive jurisdiction over claims brought by or against the insolvent ProMed because the divestiture of the receivership court's jurisdiction by the exercise of federal jurisdiction (a prototypical supersession) did "not so substantially impair the deputy receiver's ability to effect ProMed's liquidation under the Insolvency Act as to run afoul of the proscriptions of the McCarran-Ferguson Act." *Murff*, 97 F.3d at 292.

In reaching its decision, the Eighth Circuit fashioned its own test, adding to three already conflicting tests applied respectively by: (i) the First, Seventh and Ninth Circuits; (ii) the Fourth Circuit; and (iii) the Sixth Circuit. Under the Eighth Circuit's test, application of McCarran-Ferguson is not triggered unless an acknowledged federal statutory impairment, invalidation, or supersession of a particular state statute regulating the business of insurance also works a "substantial impairment" of the overarching regulatory scheme.

Secondly, the decision of the Eighth Circuit is in conflict with the decisions of a number of state courts of last resort on the issue of whether McCarran-Ferguson protects the exclusive jurisdiction of state receivership courts from federal interference. These courts have consistently held that the exclusive jurisdiction of state receivership courts, over claims by and against an insolvent insurer, is insulated by the McCarran-Ferguson Act from federal legislative interdiction. This Court should review the Eighth Circuit decision to resolve these differences.

Finally, this case is not only of great legal importance but of great practical significance as well. The confusion among the lower courts on this question jeopardizes the comprehensive liquidation schemes not only of Missouri but of every state in the nation. Congress and this Court have recognized that the regulation of insurance is an enterprise of paramount public interest. Effective regulation requires certainty of jurisdiction and will allow the state insurance commissioners to effectively liquidate insolvent insurance companies. The need of insurance commissioners, as protectors of the public interest, for a

definitive answer to this issue also calls for an exercise of this Court's certiorari power.

I.

THE EIGHTH CIRCUIT'S DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY DECIDED BY THIS COURT ON WHICH DECISIONS OF THE COURTS OF APPEALS CONFLICT

1. This Court Has Not Decided The Meaning Of "Invalidate, Impair, or Supersede"

No holding of this Court binds the Courts of Appeals in applying the third prong of the test articulated in *Fabe*, 508 U.S. 491 (1993), to determine whether a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance within the meaning of the McCarran-Ferguson Act. *Fabe* directs that challenges to federal legislation under the McCarran-Ferguson Act be analyzed by resolving three questions: (i) does the federal statute at issue specifically relate to the business of insurance; (ii) if not, was the state statute at issue enacted for the purpose of regulating the business of insurance; and (iii) if so, would application of the federal statute invalidate, impair, or supersede the state law? *Fabe*, 508 U.S. at 501; *Murff*, 97 F.3d at 291, citing *Fabe*.

Barnett Bank, N.A. v. Nelson, 116 S.Ct. 1103 (1996), binds the Circuit Courts on the manner in which to resolve the first question; *Fabe* binds them on the manner in which to resolve the second.

The Court's only consideration of the third prong of the test, however, *S.E.C. v. National Sec., Inc.*, 393 U.S. 453

(1969), appears in dicta. After holding that the Arizona statutes at issue in that case were not laws enacted for the purpose of regulating the business of insurance, the Court observed that:

> It is clear that any 'impairment' in this case is a most indirect one . . . Arizona has not commanded something which the Federal Government seeks to prohibit . . . The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policyholders . . . In these circumstances, we simply cannot see the conflict.

393 U.S. at 463.

As illustrated by the divergent tests developed by the Courts of Appeals, they are not meaningfully aided by this dicta,[1] which, at most, considered only whether the questioned federal legislation "impaired" a state law regulating the business of insurance (and so did not address the meaning to be ascribed to McCarran-Ferguson's prohibition of federal statutory "invalidation" or "supersession").

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[1] Even if characterized as an alternative holding, the quoted language from *National Securities* may be fairly read to suggest: (i) that indirect conflicts between federal legislation and state laws regulating the business of insurance do not offend McCarran-Ferguson; (ii) that any interplay of federal legislation and a state law regulating the business of insurance other than "perfect compatibility" offends McCarran-Ferguson; or (iii) that, the Court simply found no conflict between the federal and state statutes at issue in *National Securities*.

2. The Courts of Appeals Have Promulgated Four Different Tests To Determine Whether Federal Laws "Invalidate, Impair, or Supersede" State Insurance Statutes

As set forth below, to determine whether a federal statute invalidates, impairs or supersedes a state law regulating the business of insurance, the other circuits have adopted three different tests; *Murff* has adopted yet a fourth. *Murff* concerns a federal court's assertion of jurisdiction in relation to a federal statutory claim – supplanting the state receivership court's jurisdiction and overriding its injunction. In several other circuits' decisions, the collision between federal legislation and the state regulatory scheme arises in the context of claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* attacking conduct that is subject to regulation under state insurance laws. In all instances, the issue is whether the operation of the federal statute would result in an invalidation, impairment or supersession of the state regulation such as would violate McCarran-Ferguson.

a. The First, Seventh and Ninth Circuits

In reliance on the *National Securities* dicta cited above, the First, Seventh and Ninth Circuits have applied a "direct conflict" test to determine whether a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance. Under this test, federal legislation runs afoul of the proscriptions of McCarran-Ferguson only "where the federal law expressly prohibited acts permitted by state law or vice versa." *Merchants*

Home Delivery Servs., Inc. v. Frank B. Hall & Co., 50 F.3d 1486, 1492 (9th Cir.),[2] *cert. denied*, 116 S.Ct. 418 (1995); *Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996), *following Merchants Home*.

The "direct conflict" test (one of statutory construction) is an intussusception of McCarran-Ferguson's three-part prohibition of federal legislative impairment, invalidation or supersession into a single inquiry. It fashions a single litmus test – direct conflict – by merging three distinct conditions.

Accordingly, in *Merchants Home*, the Ninth Circuit concluded that, where RICO prohibits acts that are also prohibited by California insurance regulation, application of the federal law to conduct comprising the business of insurance did not "invalidate, impair, or supersede" California statutes regulating the business of insurance, notwithstanding material differences in the state and federal statutes:

> We have not previously addressed the question of exactly when a federal statute "invalidate[s], impair[s], or supersede[s]" a state law under § 2(b). The Seventh Circuit, however, recently addressed this issue in *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir.1992). In that case, the court was faced with the question of whether the Fair Housing Act could be invoked to prohibit "redlining" by home insurers. As in the present case, state law

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[2] *Following NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

> prohibited the conduct, but allowed only administrative remedies, whereas the federal law allowed a private right of action. *In a very thorough opinion, Judge Easterbrook expressly rejected the "upset the balance" argument and concluded that the narrower "direct conflict" construction of the McCarran-Ferguson Act was appropriate.*
>
> *Thus, the [Seventh Circuit] concluded that state and federal laws proscribing identical conduct do not conflict with or displace each other, and may coexist under the McCarran-Ferguson Act.*
>
> * * *
>
> We hold that the application of a federal statute prohibiting acts which are also prohibited under a state's insurance laws does not "invalidate, impair, or supersede" the state's laws under § 2(b) of the McCarran-Ferguson Act.
>
> * * *
>
> Under this rule, § 2(b) allows the application of RICO to the present facts. Hall concedes, indeed strenuously argues, that California law prohibits the acts alleged by Merchants. As RICO prohibits these same acts, there is no conflict; RICO does not invalidate, impair, or supersede California law in this context.

Merchants Home, 50 F.3d at 1491-92 (emphasis supplied).[3]

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[3] *See also Forsyth v. Humana, Inc.*, 99 F.3d 1504 (9th Cir. 1996) (adhering to the test articulated in *Merchants Home*); *Zenith Ins. Co. v. Eisenberg*, Nos. 94-55983, 94-56188, 94-56138, 1996 U.S. App. LEXIS 26815 (9th Cir. October 11, 1996) (unpublished) (same).

b. The Sixth Circuit

The test applied, and the result reached, by the Sixth Circuit on the very same question conflicts with the First, Seventh, and Ninth Circuits. In *Kenty v. Bank One, N.A.*, 92 F.3d 384 (6th Cir. 1996), the Sixth Circuit accepted the argument, rejected by the Ninth Circuit in *Merchants Home*, that McCarran-Ferguson broadly proscribes application of federal law where a state has regulated, or chosen not to regulate, the business of insurance. Accordingly, *Kenty* not only considered the existence of direct conflicts between RICO and Ohio insurance statutes, but areas of inconsistency and overlap between the two statutes, as well.

Applying that test, the Sixth Circuit determined that, because distinctions exist between the conduct-regulating and remedial provisions of the state and federal statutes, McCarran-Ferguson bars RICO claims against insolvent insurers:

> Thus, as the plain language of the statute suggests, this is fundamentally a question of what *effect* RICO has on the state law.
>
> In this case, Transamerica has pointed to several substantive sections of the Ohio Revised Code that would be either impaired or superseded by application of RICO. Most notably, sections 3901.21-.22 of the Ohio Revised Code provide detailed regulation and remedies for unfair and deceptive acts, including making misrepresentations and providing rebates. *The different liability under Ohio law for violations, as well as different*

> *standards of proof necessary to demonstrate misrepresentations, means that RICO does impair the ability of Ohio to regulate this type of behavior. In particular, RICO calls for treble damages, which Ohio law does not.* RICO requires some showing of fraud, whereas Ohio law flatly outlaws rebates in auto insurance regardless of whether fraud is involved. Finally, Ohio law may employ a different standard than the one under RICO to determine when a "misrepresentation" violates its statute. *In short, applying RICO to insurance companies would subject them to a different standard of behavior than the one envisioned by Ohio.* By holding insurance companies liable under a federal law, such as RICO, when Ohio law provides for no liability, RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business. In this instance, application of RICO to Transamerica is precluded by McCarran-Ferguson. Consequently, state law governs whatever misconduct Transamerica may have committed.

Kenty, 92 F.3d at 393 (internal citations omitted) (emphasis supplied).[4]

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[4] Similarly, the Middle District of Pennsylvania has held that McCarran-Ferguson precluded application of RICO to insurers. *Wexco, Inc. v. IMC, Inc.*, 820 F.Supp. 194 (M.D.Pa. 1993) (RICO claim precluded because the Pennsylvania insurance regulatory scheme did not authorize treble damages which RICO allowed). The Third Circuit, however, has not addressed the question.

c. The Fourth Circuit

The Fourth Circuit's test, articulated in a district court decision, *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996),[5] likewise expressly rejects the tests applied by the First, Seventh and Ninth Circuits, and instead opts for a "plain statement approach" to the third prong of the *Fabe* test:

> However, several recent decisions by courts of appeals outside of the Fourth Circuit have held that federal statutes do not "invalidate, impair or supersede" state statutes by permitting private causes of action not available under the state law or by allowing remedies not available under the state law. *See Nationwide Mut. Insurance Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995);[6] *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1486, 1491-92

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[5] In its unpublished decision, the Fourth Circuit held: "We fully agree with the district court's reasoning and conclusion that the plaintiffs' RICO claim is precluded by the McCarran-Ferguson Act, and therefore affirm the decision below on that basis." *Ambrose*, No. 95-2466, 1996 U.S. App. LEXIS 22035 at *4-5, *affirming Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153 (E.D.Va. 1995).

[6] *Kenty v. Bank One, N.A.*, 92 F.3d 384 (6th Cir. 1996), cited above, issued the year after *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), is the Sixth Circuit's most recent articulation of the manner in which to determine whether a federal statute, not specifically relating to the business of insurance, invalidates, impairs, or supersedes a state law enacted for the purpose of regulating the business of insurance.

(9th Cir. 1995); *National Association for the Advancement of Colored People v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992), cert. denied, 124 L. Ed. 2d 247, 113 S. Ct. 2335 (1993).

* * *

. . . . all three decisions proceed upon a common, but flawed, analytical model by assessing the "invalidate, impair or supersede" facet of the McCarran-Ferguson analysis as an issue of "inverse preemption." *Nationwide*, 52 F.3d at 1363; *Merchants Home Delivery*, 50 F.3d at 1492; *American Family*, 978 F.2d at 296. As a result, all three decisions assess the effect of Section 2(b) of the McCarran-Ferguson Act through the prism of jurisprudence developed to determine when, under the Supremacy Clause, a federal statute preempts state law. *This accounts for the fact that American Family, Nationwide and Merchants Home Delivery interpreted the McCarran-Ferguson Act to require a showing of direct conflict between the state and federal law to preclude application of the state law* and then augmented that determination by concluding that state and federal law could co-exist even though the federal law provided a cause of action not provided under state law and remedies greater than those provided by state law. *Nationwide*, 52 F.3d at 1363, *Merchants Home Delivery*, 50 F.3d at 1492; *American Family*, 978 F.2d at 295-97.

* * *

The McCarran-Ferguson Act does not admit of such an analysis even though in it Congress declared the primacy of state law in the regulation of the business of insurance. This is because the McCarran-Ferguson Act does not turn on status, *i.e.*, supremacy of a body of law, but on

> the effect of the law, *i.e.*, whether an act of Congress "invalidates, impairs or supersedes" certain kinds of state law.

Ambrose, 891 F.Supp. at 1166-68 (emphasis supplied).

For that reason, *Ambrose* rejected the "direct conflict test," instead measuring the appropriate interplay of RICO and Virginia insurance regulatory statutes by considering whether construing RICO to authorize plaintiff's federal suit would result in *any* of the three federal legislative interferences proscribed by McCarran-Ferguson:

> The issue is whether application of RICO would "invalidate, impair or supersede" Chapter 5 of Title 38.2. The words "invalidate, impair and supersede" are not defined in the McCarran-Ferguson Act. Like all statutory terms, those three words must be given their ordinary meaning unless another meaning is dictated by the context in which they are used or by statutory definition.
>
> "Invalidate" means to "weaken or make valueless" or to discredit. It is a synonym for nullify. Webster's Third New International Dictionary 1188 (1986). "Impair" means to "make worse . . . diminish in quantity, value, excellence or strength . . . do harm to." "Supersede" means to "make obsolete, inferior, or outmoded . . . to make void . . . to make superfluous or unnecessary."

Id. at 1165. Accordingly, the court found:

> Application of RICO to afford redress for violations of Chapter 5, *would invalidate and impair the regulation sought to be accomplished* by Chapter 5 and the enforcement mechanisms of Va. Code

> §§ 38.2-218-220 . . . The prospect of treble damages and attorneys fees would weaken, diminish and do serious injury to, if not nullify, the sections of Chapter 5, and the enforcement mechanisms which protect and regulate that relationship.
>
> *Application of RICO would also supersede the state laws at issue.* Because RICO provides for a private cause of action and treble damages, and because these provisions of RICO differ dramatically from the way in which Virginia's insurance code addresses the same conduct, RICO would in effect replace Chapter 5 as the principal means by which to remedy such conduct. It would convert a system of public redress into a system of private redress. The forum for redress would shift from the SCC [state corporation commission] to the federal courts. The result of these effects would be that RICO would supersede Virginia's laws.

Id. (emphasis supplied).

d. The Eighth Circuit In *Murff*

In *Murff*, the Eighth Circuit strikes out in yet another direction. *Murff* holds that, notwithstanding the exclusive jurisdiction of the Missouri receivership court over actions by or against the insolvent ProMed, the exercise of federal jurisdiction over Murff's ADEA claim against ProMed is not prohibited by McCarran-Ferguson because its exercise:

> would *not so substantially impair the deputy receiver's ability to effect ProMed's liquidation*

> under the Insolvency Act as to run afoul of the proscriptions of the McCarran-Ferguson Act.

Murff, 97 F.3d at 292 (emphasis supplied).

Murff, therefore, cuts a separate path. It injects a novel inquiry – the *degree* to which the federal law's impairment of the state regulatory statute impacts on the overall state regulatory *scheme* – into a question that the other Circuit Courts have treated, albeit inconsistently, as a matter of construction of specific statutes. Thus, *Murff* stands for the proposition that whether a federal statute impairs, invalidates or supersedes any specific state *statute* regulating the business of insurance is only the threshold, rather than the dispositive, determination in connection with the third prong of the *Fabe* analysis.

In so holding, the Eighth Circuit reads into McCarran-Ferguson a tolerance for the impairment of some state statutes regulating the business of insurance so long as, in the court's view, the negation of a particular regulatory statute does not "substantially" impair the effectiveness of the state's overall regulatory scheme. That analysis – which assesses the degree of impairment of the scheme rather than the fact of impairment, invalidation, or supersession of the individual regulatory statute – clearly conflicts with the tests articulated by the First, Fourth, Sixth, Seventh and Ninth Circuits. Decisions in those Circuits, as illustrated above, parse, section by section, the relevant statutes, seeking to identify any "direct conflict" (in the First, Seventh, and Ninth Circuits) or "invalidation, impairment, or supersession" (in the Fourth Circuit), or the prescription of "different standards of conduct" (in the Sixth Circuit). *See e.g., Ambrose*,

891 F. Supp. at 1166 ("Rather, the language of Section 2(b) requires that a court look at the actual effect of the federal law on the specific state law").

Like the First, Ninth and Seventh Circuits, *Murff* also collapses McCarran-Ferguson's tripartite ban of inexplicit congressional invalidation, impairment, or supersession of state laws regulating the business of insurance into a single prohibition – an approach expressly rejected by the Fourth Circuit. Unlike the First, Ninth and Seventh Circuits though, *Murff* does not compress the three into the proxy standard of "direct conflict," but instead suggests that McCarran-Ferguson's dispositive prohibition is against "substantial impairment" of statutory schemes – not against invalidation, impairment, or supersession of particular statutes enacted for the purposes of regulating the business of insurance.

The conflict between the Eighth Circuit's decision in *Murff* and the decisions of: (i) the First, Seventh and Ninth Circuits; (ii) the Fourth Circuit; and (iii) the Sixth Circuit raises an important question of federal law which should be settled by this Court.

II.

THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE STATE COURTS OF LAST RESORT

The Eighth Circuit's decision also conflicts with the holdings of a number of state appellate courts, including the highest courts of the states of Michigan and Arkansas, all of which hold the jurisdiction of state courts charged with the liquidation of an insolvent insurer to be exclusive, and two of which hold, contrary to *Murff*, that the

McCarran-Ferguson Act protects that exclusive jurisdiction from federal interference unless the federal statute specifically relates to the business of insurance. *See Insurance Comm'r v. Arcilio*, No. 187813, 1997 WL 9738 (Mich.Ct.App. January 10, 1997) (holding that McCarran-Ferguson protects receivership court injunction of proceedings outside the receivership court from federal interference notwithstanding *Donovan v. Dallas*, 377 U.S. 408 (1964));[7] *Baldwin-United Corp. v. Garner*, 283 Ark. 385, 678 S.W.2d 754 (1984), *cert. denied*, 471 U.S. 1111 (1985); *Knickerbocker Agency, Inc. v. Holz*, 4 N.Y.2d 245, 149 N.E.2d 885, 173 N.Y.S.2d 602 (1958) (holding that New York's enactment of the Uniform Insurers Liquidation Act vests the state receivership court supervising the Superintendent of Insurance as Liquidator with the exclusive jurisdiction of all claims by and against an insolvent insurer); *see also Medallion Ins. Co. v. Wartenbee*, 568 S.W.2d 599 (Mo.Ct.App. 1978) (holding that the receivership court has exclusive jurisdiction over claims by and against the insolvent insurer); *Garamendi v. Executive Life Ins. Co.*, 17 Cal.App.4th 504, 519, 21 Cal.Rptr.2d 578 (2d Dist. 1993).

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[7] The Eighth Circuit's decision conflicts: (i) with *Arcilio*, holding, in reliance on *Donovan*, that "a state court cannot, of course, enjoin federal court actions [to protect its exclusive jurisdiction over the liquidation of insolvent insurers]," *Murff*, 97 F.3d at 290, n.2. citing *Donovan*; and (ii) generally with the cited cases of state courts of last resort also holding the jurisdiction to be exclusive.

In *Garner*, the Supreme Court of Arkansas affirmed a rehabilitation court order, that enjoined the commencement or continuation of suits against the insurers in rehabilitation, in order to preserve the exclusive jurisdiction of the rehabilitation court. The *Garner* court held that McCarran-Ferguson protected the rehabilitation court's exclusive jurisdiction against claims brought in federal court:

> We do not hold that the McCarran-Ferguson Act prohibits a person from making a claim in Bankruptcy against an insurance company under any circumstances. In this instance, however, an insurar company is being rehabilitated pursuant to a state statutory scheme, and the rehabilitation court found it necessary to enjoin other proceedings in order to secure an orderly rehabilitation. Therefore, the McCarran-Ferguson Act prevents the Bankruptcy Act from being used to invalidate or impair the Arkansas statutes. The appellants do not have an absolute right to pursue their claims in bankruptcy court.

Baldwin-United Corp. v. Garner, 283 Ark. at 393, 678 S.W.2d at 758. *See also United States Fin. Corp. v. Warfield*, 839 F.Supp. 684, (D.Ariz. 1993) (holding that the application of McCarran-Ferguson divests the federal court of jurisdiction over claims brought against an insolvent insurer).

Indeed, because *Murff* offers no rationale for distinguishing impairment in consequence of the exercise of federal jurisdiction over ADEA claims, on the one hand, from impairment which would result from the exercise of federal diversity jurisdiction, on the other hand, *Murff* is fairly read as authority gutting the exclusive jurisdiction that state courts have traditionally exercised over the

liquidation of insolvent insurers – whatever the claimed basis of federal jurisdiction. The conflict between *Murff* and the cited decisions of the various state courts of last resort requires resolution by this Court.

III.

THE *MURFF* DECISION UNSETTLES THE ORDERLY ADMINISTRATION OF INSOLVENT INSURERS NOT ONLY IN MISSOURI BUT THROUGHOUT THE NATION

The question raised by this petition directly affects the state-regulated receiverships of insolvent insurers in the seven states within the bounds of the Eighth Circuit, and indirectly affects insurer liquidations and receiverships nationwide.

Murff's potential impact is enormous. Statutory liquidators of insurers across the nation are currently administering the winding-up of approximately 500 receiverships, some 17 of which are administered pursuant to Missouri's Insolvency Act. *NAIC Report on Receiverships (formerly Contact Person Report)*, NAIC 1987, 1996, Revised Edition, National Association of Insurance Commissioners, Publications Department. Losses from four of the largest insurance insolvencies alone exceed $5 billion. *Failed Promises: Insurance Company Insolvencies*, Report by the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce (Feb. 1990). At page 2.

The magnitude of these estates – and of the innumerable numbers of claims that could be brought against them – has prompted at least twenty-three other states to

enact precisely the same provision as Mo.Rev.Stat. § 375.1188(1) to ensure the exclusive jurisdiction of their receivership courts, and to protect the assets of the insolvent insurers that they are charged to marshall, from piecemeal litigation.[8] As authority for federal interdiction of these statutes, and for negation of the legislative determinations animating them, *Murff* affects state insurance receivers nationwide.[9]

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[8] Colorado, C.R.S. 10-3-523 (1996); Connecticut, Conn.Gen.Stat. § 38a-926 (1994); District of Columbia, D.C.Code § 35-2822 (1996); Georgia, O.C.G.A. § 33-37-23 (1996); Hawaii, H.R.S. § 431:15-313 (1996); Idaho, Idaho Code § 41-3324 (1996); Indiana, Burns Ind. Code Ann. § 27-9-3-12 (1996); Iowa, Iowa Code § 507C.24 (1996); Kansas, K.S.A. § 40-3627 (1995); Michigan, M.S.A. § 24.18124 (1996); Mississippi, Miss.Code.Ann. § 83-24-47 (1996); Montana, Mont.Code.Anno. § 33-2-1348 (1995); Nebraska, R.R.S.Neb. § 44-4824 (1996); New Jersey, N.J.Stat. § 17B:32-53 (1996); North Carolina, N.C.Gen.Stat. § 58-30-130 (1996); North Dakota, N.D.Cent.Code § 26.1-06.1-23 (1995); Puerto Rico, 26 L.P.R.A. § 4021 (1992); Rhode Island, R.I.Gen.Laws § 27-14.3-28 (1995); South Carolina, S.C. Code Ann. § 38-27-430 (1996); South Dakota, S.D. Codified Laws § 58-29B-55 (1996); Tennessee, Tenn. Code Ann. § 56-9-313 (1996); Vermont, 8 V.S.A. § 7063 (1996); Washington, Rev. Code Wash. (A.R.C.W.) § 48.31.131 (1996). Moreover, this list includes only those provisions with identical language to that in Missouri. A number of other states contain exclusive jurisdiction provisions in their insurance codes which use different language to effect the same goal.

[9] State courts have consistently asserted the importance to the liquidation process of having all claims adjudicated in one court. *See Baldwin-United Corp. v. Garner*, 283 Ark. at 393, 678 S.W.2d at 758 ("The rehabilitation court needs to be able to subject the companies and those asserting claims to a coherent and compulsive legal process, or it would be severely constrained in its efforts"); *Knickerbocker Agency, Inc. v. Holz*, 4

The conflict presented by *Murff* and the decisions of the First, Fourth, Sixth, Seventh, and Ninth Circuits, is stark and portentous. *Fabe* has resolved the manner in which to identify state statutes regulating the business of insurance; *Barnett Bank* has done the same for the issue of whether a federal statute specifically relates to the business of insurance. A binding pronouncement on the question presented by this petition – the manner in which to effect McCarran-Ferguson's prohibition of federal statutory invalidation, impairment, or supersession of state statutes regulating the business of insurance – will complete the Court's analytical framework for application of McCarran-Ferguson. For these reasons, Petitioners respectfully request that this Court review the decision below.

N.Y.2d at 252, 149 N.E.2d at 890, 173 N.Y.S.2d at 608, ("in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court") *citing Motlow v. Southern Holding & Sec. Corp.*, 95 F.2d 721, 725-726 (8th Cir.), *cert. denied*, 305 U.S. 609 (1938).

CONCLUSION

For the foregoing reasons, Petitioner ProMed respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit so that this Court may review and decide the questions presented by this case.

Respectfully submitted,

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February 7, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3489

G. Thomas Murff, Appellant, v. Professional Medical Insurance Company; Professional Medical Risk Retention Group, In Liquidation, Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 16, 1996

Filed: October 4, 1996

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Thomas Murff appeals from the district court's order dismissing his claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq. We reverse and remand.[1]

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[1] ProMed's motion to strike portions of Murff's brief and appendix is denied as moot in light of the fact that the matters

I.

Murff's employer, Professional Medical Insurance Company and Professional Medical Risk Retention Group (collectively ProMed) demoted Murff on March 15, 1993, and then terminated him on February 15, 1994, replacing him with a younger employee. On February 7, 1994, ProMed entered rehabilitation under the supervision of the Circuit Court of Jackson County, Missouri, acting as the receivership court. *See* Insurers Supervision, Rehabilitation and Insolvency Act (Insolvency Act), Mo. Rev. Stat. §§ 375.1150 et seq. (1994). On February 17, 1994, Murff brought this action under the ADEA and the Missouri Human Rights Act. When ProMed's rehabilitation was converted to a liquidation on April 7, 1994, the state receivership court enjoined all persons from obtaining any judgment against ProMed.[2] The Director of the Missouri Department of Insurance then appointed Cynthia Clark Campbell as Special Deputy Receiver of ProMed to effect liquidation proceedings.

The district court dismissed Murff's claim pursuant to Federal Rule of Civil Procedure 12(b)(1), finding that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq., precluded it from exercising jurisdiction because "the independent exercise of jurisdiction over Murff's claim would impair Missouri's Insolvency Act." The court also

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contained in the challenged materials are irrelevant to our disposition of the appeal.

[2] A state court cannot, of course, enjoin federal court actions. *General Atomic Co. v. Felter*, 434 U.S. 12 (1977); *Donovan v. Dallas*, 377 U.S. 408 (1964); *Fragoso v. Lopez*, 991 F.2d 878, 881 (1st Cir. 1993).

ruled that "[s]hould the liquidation court conclude that a separate tribunal should hear the case, then jurisdiction may become proper here." The district court's dismissal of Murff's complaint presents a question of law that we review de novo. *See Furrer v. Brown*, 62 F.3d 1092, 1093 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1567 (1996).

II.

Missouri's Insolvency Act establishes procedures for the liquidation of bankrupt insurance companies and sets priorities for their policyholders and other creditors. *See State ex rel Missouri Property & Casualty Ins. Guar. Ass'n v. Brown*, 900 S.W.2d 268, 270 (Mo. Ct. App. 1995). The Insolvency Act provides that no "existing actions be maintained or further presented after issuance of [a liquidation] order," § 375.1188, converts such actions to claims in receivership court, § 375.1210, and establishes the priority of distribution of such claims. § 375.1218.

Section 2(b) of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).

The McCarran-Ferguson Act allows states to regulate and tax the business of insurance free from barriers that broad-sweeping federal statutes might inadvertently impose on insurance companies. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). The Act was Congress' response to the Supreme Court's decision in

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), which had held that the Sherman Act was applicable to insurance companies. The McCarran-Ferguson Act's basic purposes were to allay doubts about states' power to tax and regulate insurance companies, *see F.T.C. v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960), and to "protect state regulation primarily against *inadvertent* federal intrusion" similar to that threatened by the Sherman Act. *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103, 1112 (1996).

A federal statute is inverse-preempted under the McCarran-Ferguson Act if (1) it does not "specifically relate[] to the business of insurance"; (2) the state statute was enacted "for the purpose of regulating the business of insurance"; and (3) the federal statute would "invalidate, impair or supersede" the state statute. *Fabe*, 508 U.S. at 501.

A.

We agree with the district court that the ADEA does not specifically relate to the business of insurance. In *Barnett Bank*, the Court analyzed a federal statute permitting a small-town national bank to "*act as the agent for any fire, life, or other insurance company.*" 116 S. Ct. at 1106 (quoting 12 U.S.C. § 92 (1916)) (emphasis in original). Noting that the statute explicitly referred to insurance, the Court held that it specifically related to the business of insurance. *Id.* at 1111. The Court contrasted implicit references to insurance made by general language such as "business activity" with the words "finance, banking, and

insurance," which make such a reference explicitly and specifically. *Id.*

The ADEA does not contain a specific, explicit reference to insurance. The only reference to insurance companies is the term "employer," at best only an implicit reference to insurance. The ADEA thus fails the *Barnett Bank* specificity test.

B.

We agree with the district court that the Missouri Insolvency Act was enacted "for the purpose of regulating the business of insurance." A state statute regulates the business of insurance if it "affects the relation of insured to insurer and the spreading of risk." *Barnett Bank,* 116 S. Ct. at 1112. "[F]ederal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe,* 508 U.S. at 501-02. *See also Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 211-212 (1979); *S.E.C. v. National Securities, Inc.,* 393 U.S. 453, 460 (1969).

The Ohio statute at issue in *Fabe* gave the claims of policyholders priority over those of the federal government. The Court found that the scheme protected policyholders "by ensuring the payment of [their] claims despite the insurance company's intervening bankruptcy." The scheme safeguarded the performance of insurance contracts, "an essential part of the 'business of insurance." *Fabe,* 508 U.S. at 505. The Ohio statute, therefore, was "a law 'enacted for the purpose of regulating the business of insurance.' " *Id.* at 505.

We conclude that the Missouri statute purporting to stay all actions against an insolvent insurer is "a law regulating the business of insurance." It protects policyholders because it preserves the assets of the insolvent insurer's estate, thereby enhancing the ability of an insolvent insurance company to perform its contractual obligations.[3]

C.

In determining whether the federal statute will "impair, invalidate, or supersede" the state statute, we must examine the interaction between the federal and state statutes and analyze whether this interaction is one the McCarran-Ferguson Act was intended to address. The district court, identifying no conflict between the substantive provisions of the ADEA and the Insolvency Act, nonetheless found that the exercise of jurisdiction over Murff's ADEA claim would impair Missouri's Insolvency Act.

The McCarran-Ferguson Act seeks to "protect state regulation primarily against inadvertent federal intrusion," *Barnett*, 116 S. Ct. at 1112. Thus, the McCarran-Ferguson Act applies whenever Congress "is attempting to regulate" broadly and that regulation would intrude "in the sphere reserved primarily to the States by the McCarran-Ferguson Act." *National Securities*, 393 U.S. at 463.

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[3] For an example of a state statute that has been held not to regulate the business of insurance, *see International Ins. Co. v. Duryee*, 1996 WL 536678 (6th Cir. Sept. 24, 1996).

In *National Securities,* the Securities and Exchange Commission (SEC) attempted to unwind an allegedly fraudulent merger of two insurance companies that Arizona had approved. The Supreme Court rejected the state's argument that any SEC interference with the merger would "invalidate, impair, or supersede" the state's right to protect policyholders, stating that "[w]e cannot accept this overly broad restriction on federal power." *Id.* at 462-63. The Court explained that the federal government sought to regulate an area entirely distinct from insurance law and that Arizona law did "not command[] something that the Federal Government [sought] to prohibit." *Id.* at 462-63. *See also Villafane-Neriz v. F.D.I.C.,* 75 F.3d 727, 736 (1st Cir. 1996) (no "impairment" of state statute if federal statute does not directly prohibit state-allowed activity and influence on state control is merely indirect); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.,* 50 F.3d 1486, 1492 (9th Cir.) (a federal law "will be precluded only where [it] expressly prohibit[s] acts permitted by state law, or vice versa"), *cert. denied,* 116 S. Ct. 418 (1995).[4]

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[4] Murff cites *Spirt v. Teachers Ins. & Annuity Ass'n,* 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds,* 463 U.S. 1223 (1983), for the proposition that the McCarran-Ferguson Act does not apply to statutes such as the ADEA.

> The McCarran Act was never meant to prevent, and could not prevent, Congress from explicitly imposing requirements on employers and their agents under the civil rights statutes, the National Labor Relations Act, or any other statute that seeks to enforce compliance with federal policies in such fields as civil rights, labor and other areas of national concern.

When viewed in the light of the principles and purposes underlying the McCarran-Ferguson Act, as explained in *Barnett Bank* and *National Securities*, there is no inherent conflict between the ADEA and the Insolvency Act. The ADEA does not prohibit something that the Insolvency Act commands, nor does it command something that the Insolvency Act prohibits. The provisions of the ADEA itself, applied to insurance companies, are entirely compatible with the state's regulation of insurance law.

ProMed does not dispute this point, but contends instead that the exercise of federal jurisdiction over Murff's federal claim would impair the Insolvency Act's comprehensive scheme for efficiently and equitably liquidating insolvent insurance companies. As we see it, however, the adjudication of an ADEA claim in federal court would not so substantially impair the deputy receiver's ability to effect ProMed's liquidation under the Insolvency Act as to run afoul of the proscriptions of the McCarran-Ferguson Act.

Any money judgment that Murff may obtain against ProMed would at best appear to be a low-ranked claim in the order of priorities established by section 375.1218.

Id. at 1066. As the Seventh Circuit has pointed out, however, *Spirt* stands on doubtful ground. *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 293-97 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). In light of our holding that the ADEA does not impair the Missouri Insolvency Act, we need not reach this issue. We note that Congress could, of course, except the ADEA from the reach of the McCarran-Ferguson Act, just as it has the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act. 15 U.S.C. § 1014.

Likewise, any equitable relief in terms of reinstatement would be highly improbable in light of ProMed's soon-to-occur liquidation. There would, of course, be the administrative bother and expense of having to defend against the ADEA action, but this is a factor that the district court can weigh in deciding whether to stay Murff's action.

In *Wolfson v. Mutual Ben. Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1996), a life insurance policy beneficiary sued an insurer for benefits under an ERISA plan. The insurer then became insolvent, with the result that the state's "mandatory special procedure to adjudicate claims against the insolvent" was applicable. *Id.* at 145. The district court stayed the beneficiary's claim, and we affirmed under the *Burford*[5] and *Colorado River*[6] abstention doctrines. In affirming the stay, we implicitly acknowledged that the district court's jurisdiction over Wolfson's federal ERISA claim was proper. We also stated that "[t]he district court properly protected Wolfson's claim for monetary relief under ERISA by staying rather than dismissing" it, suggesting that surrendering jurisdiction over Wolfson's federal claim would have been erroneous. *Id.* at 147.

Wolfson recognized that the McCarran-Ferguson Act reflects "a strong federal policy of deferring to state regulation of the insurance industry," including insolvency statutes. *Id.* at 147. This policy, however, does not translate into state preemption of federal jurisdiction or void

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[5] *Burford v. Sun Oil*, 319 U.S. 315 (1943).

[6] *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976).

every federal statute under which a plaintiff may sue an insolvent insurer in federal court, but merely counsels that a federal court consider the propriety of abstaining from or staying the federal action. *See Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426-27 (7th Cir. 1990); *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033, 1038-39 (1988), *cert. denied*, 493 U.S. 842 (1989); *Law Enforcement Ins. Co., Ltd. v. Corcoran*, 807 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987).

We conclude, therefore, that the district court should not have dismissed the action but should instead have considered whether the action should be stayed. Although the statement "jurisdiction may become proper here" may have the overtones of a stay, still and all the order was that of a dismissal and not a stay.

The judgment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

G. THOMAS MURFF Plaintiff, v. PROFESSIONAL MEDICAL INSURANCE COMPANY and PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION, Defendants.	)	Case No. 94-0164-CV-W-8

ORDER

(Filed Aug. 29, 1995)

Before the Court are defendants' motion to dismiss and motion to stay. For the reasons given below, defendants' motion to dismiss is granted and defendants' motion to stay is dismissed as moot.

Plaintiff is a former employee of the defendants which are related corporations. He has filed a two count complaint against the defendants. In count I, plaintiff alleges that the defendants discriminated against him on the basis of age in violation of Age Discrimination in Employment Act ("ADEA") of 1967, as amended, 29 U.S.C. § 621, et seq., and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.010, et seq. In count II, he alleges that the defendants retaliated against him in violation of ADEA and MHRA after he filed a charge of age discrimination with the local, state and federal employment rights agencies.

The defendants are two insurance companies currently in liquidation in the Circuit Court of Jackson County, Missouri ("the Receivership Court"). They have filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) arguing that this Court lacks subject matter jurisdiction by operation of the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq. The defendants argue that the McCarran-Ferguson Act requires this Court to comply with a stay issued by the Receivership Court pursuant to the Insurers Supervision, Rehabilitation and Liquidation Act, Mo. Rev. Stat. §§ 375.1150 to 375.1246 (the "Insolvency Act"). The Insolvency Act authorizes the Receivership Court to stay all pending cases against an insolvent insurance companies and require all claims to be brought before the Receivership Court. *See* Mo. Rev. Stat. §§ 375.1154(2) and (6), 375.1188(1).

The Court's analysis begins with a review of the McCarran-Ferguson Act. Congress has chosen to entrust the regulation and taxation of the business of insurance to the individual states. *United States Dept. of Treasury v. Fabe*, 113 S.Ct. 2202, 2207 (1993). To this end, Congress passed the McCarran-Ferguson Act which provides that:

> the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such businesses by the several States.

15 U.S.C. § 1011; *and see, Fabe*, 113 S.Ct. at 2207. To preserve state insurance regulations from unintended preemption by federal law, the statute provides that:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . .

15 U.S.C. § 1012(b).[1]

The Supreme Court has used a three part test to determine whether the preemption exception of the McCarran-Ferguson Act will preclude the application of a particular federal statute. *See Fabe,* 113 S.Ct. at 2208. First, the Court must ask whether the federal statute "specifically relates" to the business of insurance. 15 U.S.C. § 1012(b); *and see Fabe,* 113 S.Ct. at 2208. If it does then "McCarran-Ferguson Act is inapplicable by its own terms," the exception to preemption does not apply, and the Court may assume jurisdiction. *Kachanis v. U.S.,* 844 F.Supp. 877, 881 (D.R.I. 1994). If the federal law does not specifically relate to insurance then the Court must proceed to the next stage of the analysis.

At the second stage, the court must ask whether the state has enacted a law "for the purpose of regulating the business of insurance" which covers the situation in question.[2] 15 U.S.C. § 1012(b); *and see Fabe,* 113 S.Ct. at 2208. If the state law serves no such regulatory purpose

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[1] The McCarran-Ferguson Act, by its terms, applies only three federal laws to the insurance business: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. 15 U.S.C. § 1012(b).

[2] Plaintiff maintains that the Court's analysis of the state law has two components. He thus argues that a four part test applies. The Court has considered this argument and rejected it. *See* section 2 *infra.*

then McCarran-Ferguson Act again does not apply and federal law prevails. *Kachanis,* 844 F.Supp. at 881. If the state law is regulatory, then the court must proceed to the third stage of the analysis and determine whether the two statutes present the kind of conflict which implicates the preemption exception of McCarran-Ferguson Act.

In the third prong of the test, the Court must determine whether the federal law would "invalidate, impair, or supersede" the state law. 15 U.S.C. § 1012(b). If the court finds that the federal law would impair a state insurance regime then the McCarran-Ferguson Act preemption exception applies and the federal statute must give way. If there is no impairment then the court is free to apply the federal law.

1.

The Court finds that this case meets the first prong of the McCarran-Ferguson Act preemption exception test. "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe,* 113 S.Ct. at 2210. The Supreme Court has defined the "business of insurance" in the context of the second clause of § 1012(b) which exempts "the business of insurance" from preemption by the federal anti-trust laws. Admittedly, the definition of the "business of insurance" found in the second clause of § 1012(b) is more restrictive than that found in the first clause, which is at issue here. *See Kachanis,* 844 F.Supp. at 877. However, the analysis which

the Supreme Court has developed in the context of § 1012(b) does offer guidance which is useful here.

The Supreme Court's "business of insurance" test has three parts:

> first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (U.S. 1982). The ADEA does not meet the *Pireno* test: it does not address transference of policyholders risk; it is not an integral part of the policy relationship; and it is not exclusively limited to the insurance industry. Even viewing the statute under the most generous standard, it cannot be read to relate specifically to the business of insurance.

The ADEA is broadly concerned with eliminating age discrimination in the work place. It thus attempts to regulate not the business of insurance but employment practices generally. Courts have found in other settings that federal laws whose coverage sweeps beyond the confines of the insurance industry generally do fall within the scope of McCarran-Ferguson Act. *See Kachanis*, 844 F.Supp. 877 (Federal Employment Compensation Act); *Forsyth v. Humana, Inc.*, 827 F.Supp. 1498, 1520 (D.Nev. 1993) (Racketeer Influenced and Corrupt Organizations Act). Accordingly, the Court finds that the ADEA is not an act of Congress which relates specifically to the business of insurance.

2.

Turning to the second prong of McCarran-Ferguson test, the Court must determine whether the state law in question was enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). The Supreme Court analyzed this portion of § 1012(b) in *SEC v. National Secur., Inc.*, 393 U.S. 453 (1969). The Court's analysis focused on the nature of the state statute did and whether the statue's objective affected the "business of insurance." The Court determined that:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they to [sic] must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance.'

SEC, 393 U.S. at 460. In the recent *Fabe* opinion, the Supreme Court has continued to view the second prong of the McCarran-Ferguson test as a question of whether the state statute protected or regulated the relationship between the insurer and the insured. *Fabe*, 113 S.Ct. at 2208.

The Court notes that at this point Plaintiff's analysis diverges from that proposed by the defendants and adopted by the Court. Plaintiff breaks the second stage of

the analysis into two questions: 1) whether the challenged activity constitutes the business of insurance; and 2) whether the state statute at issue was enacted for the purpose of regulating the complained of activities. Plaintiff derives this analytical format from two cases, *First Nat'l Bank v. Sedgwick James of Minnesota, Inc.*, 792 F.Supp. 409 (W.D. Pa. 1992) and *Cochran v. Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979). *See also Forsyth v. Humana, Inc.*, 827 F.Supp. 1498, 1520 (D.Nev. 1993); *Wexco Inc. v. IMC, Inc.*, 820 F.Supp. 194, 198 (M.D.Pa. 1993). The Court has reviewed these cases and finds that they are plainly inconsistent with the analytical framework employed in the Supreme Court's more recent opinion in *Fabe*. *See Fabe*, 113 S.Ct. at 2209. The Supreme Court's analysis focuses on whether the statute regulates the business of insurance, not whether the state statute regulates the complained of action. *Id.* Plaintiff's approach would remove from the McCarran-Ferguson Act statutes such as the one in this case which are procedural in character but substantive in their effect on the relationship between the insurer and the insured. Furthermore, this approach is at odds with the Supreme Court's observation that laws enacted "for the purpose of regulating the business of insurance . . . necessarily encompasses more than just the business of insurance." *Fabe*, 113 S.Ct. at 2210. Accordingly, the Court declines to follow plaintiff's narrow reading and create such an exception.

Returning then to the second prong of the Court's analysis the question is whether the state statute protects or regulates the relationship between the insurer and the insured. The statute in question is part of Missouri's complex statutory structure designed to govern the

orderly liquidation of Missouri insurance companies. The Supreme Court has addressed the question of whether a state insurance insolvency statute regulates the "business of insurance." In *Fabe* the Court determined addressed an Ohio statute which governed priority of creditors for insolvent insurance companies. There, plaintiff argued that a state priority statue [sic] did not effect the relationship between the insured and the insurer. The Supreme Court disagreed and held that:

> The Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy. Because it is integrally related to the performance of insurance contracts after bankruptcy, Ohio's law is one "enacted by the State for the purpose of regulating the business of insurance."

Id. at 2209 (quoting 15 U.S.C. § 1012(b)). Like the priority statute in *Fabe* the stay of other actions under Mo. Rev. Stat. § 375.1188 is designed to protect the insured. It designates one forum to marshall all remaining assets and dispose of all claims. By promoting efficiency this system protects the companies remaining assets for the benefit of the policy holders. Thus, the procedural rules of the Insolvency Act serve the relationship between the insurer and the insured in its waning days of the company's existence.

The Court finds further support for its position in *United States Financial Corp. v. Warfield*, 839 F.Supp. 684 (D.Ariz. 1993). *Warfield* was an action by on a stock transaction by a corporate stockholder against an insolvent

insurance company. The plaintiff also sued the stockbrokers who arranged the deal under federal securities law and it was this claim which vested jurisdiction in the district court. The claims against the insurance company, which involved breach of contract and a declaratory judgment, were before the court on supplemental jurisdiction. The insolvent insurance company moved to dismiss. It argued that the McCarran-Ferguson Act established that the state's insolvent insurer laws controlled and required plaintiff to bring its claim through the state court insurer liquidation proceedings. The district court, relying on *Fabe*, reasoned that:

> The provisions are an integral part of Arizona's scheme for regulating insolvent insurers and ensure efficacy of Arizona's statutory provisions that detail the administrative process through which claims against the insurer are submitted to the receiver and evaluated by the receiver and the receivership court. This process presumably is intended to and does conserve insurance company assets for ultimate payment to policyholders as well as other creditors. The provisions further serve the specific purpose of protecting receivers from having to litigate in multiple forums, which might lead to a depletion of the insurance company's assets, and ensure that questions relevant to Arizona's statutory scheme are resolved by the Arizona courts. Thus, A.R.S. §§ 20-612 and 20-614 apparently have been enacted to serve the interests of promoting the performance of insurance contracts during insolvency and, therefore, are statutes regulating the business of insurance.

Warfield, 839 F.Supp. at 689 (citations omitted). The reasoning of the *Warfield* court applies with equal force to Missouri's insolvency act, which promotes the performance of insurance contracts during liquidation.

The Court notes it has found two cases, *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir.1988), *cert. denied*, 489 U.S. 1096 (1989) and *Costle v. Fremont Indem. Co.*, 839 F.Supp. 265 (D.Vt. 1993), that reached a different result. However, the Court finds that these cases are distinguishable. The *Grimes* case involved a determination of rights under a reinsurance contract between an insolvent insurance company and an out-of-state reinsurance company. In that case, the liquidation court had expressly called upon the help of another court by permitting a separate declaratory judgment action on the reinsurance contract. The Tenth Circuit held that where the liquidation court invoked the help of another court removal was proper and the McCarran-Ferguson Act posed no bar to the exercise of diversity jurisdiction. *Grimes*, 857 F.2d at 702. The *Grimes* case is distinguishable on its facts because the liquidation court had purposely ceded jurisdiction over the dispute to another tribunal. That is not the case here.

In *Costle* plaintiff commenced an action in state court to collect reinsurance proceeds from an out-of-state reinsurer. The defendants removed the case to federal court and moved for a stay to permit the case to go to arbitration. Plaintiff sought a remand to state court and opposed the stay asserting, among other grounds, that the McCarran-Ferguson Act deprived the district court of jurisdiction. The district court reasoned, as the Court has in this opinion, that the [illegible]amen of the test under *Fabe* is

whether the state law affects the relationship between the policy holder and the insurer. *Costle*, 839 F.Supp. at 274. The *Costle* court noted that, "[t]o the extent that a state scheme 'is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance.' " *Costle*, 839 F.Supp. at 274 (quoting *Fabe* 113 S.Ct. at 2212). The *Costle* court then determined that the action to collect reinsurance proceeds was not subject to McCarran-Ferguson Act in part because all of the policyholders of the insolvent insurance company had already been paid. The Court finds that the *Costle* case is distinguishable on its facts since, unlike the present case, it concerned a legal proceeding which could not affect the policyholders in any way. The Court rejects plaintiff's analysis and finds that the Insolvency Act was enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Accordingly, the Court must turn now to the third and final prong of the analysis.

3.

At the third stage of the McCarran-Ferguson test, the Court must determine whether the federal law will "invalidate, impair, or supersede" the state law. 15 U.S.C. § 1012(b). The Court finds that it would. The independent exercise of jurisdiction over plaintiff's ADEA claim would impair Missouri's Insolvency Act which exists to benefit policyholders through the efficient liquidation of insolvent insurance companies. To the extent that the resolution of this claim can be handled by the liquidation court, dismissal of this action furthers the goals of Insolvency Act which the McCarran-Ferguson Act has made

preeminent. Should the liquidation court conclude that a separate tribunal should hear the case, then jurisdiction may become proper here. *See Grimes,* 857 F.2d at 702. However, the Court leaves that issue for another day.

The Court concludes that the McCarran-Ferguson Act precludes the exercise of jurisdiction because a separate resolution of plaintiff's ADEA claim would unduly impair the operation Missouri's Insolvency Act and dismissal is proper pursuant to Fed.R.Civ.P. 12(b) (1).

Accordingly, it is ORDERED that

1. Defendants' motion to dismiss (Doc. # 10) is GRANTED.

2. Defendants' motion to stay is DISMISSED AS MOOT.

/s/ Joseph E. Stevens Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT COURT

Dated: August 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3489WMKC

G. Thomas Murf, Appellant, vs. Professional Medical Ins. etc., et al., Appellees.	*	Appeal from the United States District Court for the Western District of Missouri

The petition for rehearing filed by the appellees has been considered by the court and is denied.

November 13, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3489WMKC

G. Thomas Murff,	*	
Appellant,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Professional Medical Insurance Company; Professional Medical Risk Retention Group, In Litigation,	*	
Appellees.	*	

Appellees' motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 12/27/96. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

November 27, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3489WMKC

G. Thomas Murff,	*	
Appellant,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
Professional Medical Insurance Company; Professional Medical Risk Retention Group, In Liquidation,	*	
Appellees.	*	

Appellees' motion for continuance of the stay of mandate has been considered by the court and is granted. The mandate shall be stayed until February 11, 1997.

If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

January 7, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

RELEVANT PROVISIONS OF THE MCCARRAN-FERGUSON ACT

15 U.S.C. § 1011

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

RELEVANT PROVISION OF THE MISSOURI INSURERS SUPERVISION, REHABILITATION AND LIQUIDATION ACT

Mo.Rev.Stat. § 375.1154

1. No delinquency proceeding shall be commenced after August 28, 1991, by anyone other than the director and no court shall have jurisdiction to entertain, hear or determine any proceedings commenced by any other person.

2. No court of this state shall have jurisdiction to entertain, hear or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, supervision, conservation or receivership of any insurer; or praying for an injunction or restraining order or other relief preliminary to, incidental to or relating to such proceedings other than in accordance with sections 375.1150 to 375.1246.

3. All assets of or owing to an insurer which was incorporated under the laws of this state and which is subject to a formal delinquency proceeding shall be deemed to have a situs within the jurisdiction of the court supervising such proceeding, and jurisdiction and venue of any action by the receiver to collect such assets shall be proper in such court.

. . .

6. All actions herein authorized shall be brought in the circuit court of Cole County or of any county where the principal office of the insurer is or was last located, and venue of all proceedings and cases ancillary or related to such actions shall be proper in said court.

Mo.Rev Stat. § 375.1155

1. Any receiver appointed in a proceeding under sections 375.1150 to 375.1246 may at any time apply for, and any court of general jurisdiction may grant, such restraining orders, preliminary and permanent injunctions, and other orders as may be deemed necessary and proper to prevent:

. . .

(3) Interference with the receiver or with a proceeding under sections 375.1150 to 375.1246;

. . .

(6) The institution or further prosecution of any actions or proceedings;

. . .

(11) Any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders, or the administration of any proceeding under this act.

Mo.Rev.Stat. § 375.1165.

The director may apply by petition to the court for an order authorizing him to rehabilitate a domestic insurer or an alien insurer domiciled in this state on any one or more of the following grounds:

(1) The insurer is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors or the public;

(2) There is reasonable cause to believe that there has been embezzlement from the insurer, wrongful sequestration or diversion of the insurer's assets, forgery or fraud affecting the insurer, or other illegal conduct in, by, or with respect to the insurer that if established would endanger assets in an amount threatening the solvency of the insurer;

(3) The insurer has failed to remove any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, employee, or other person, if the person has been found after notice and hearing by the director to be dishonest or untrustworthy in a way affecting the insurer's business;

(4) Control of the insurer, whether by stock ownership or otherwise, and whether direct or indirect, is in a person or persons found after notice and hearing to be untrustworthy;

(5) Any person who in fact has executive authority in the insurer, whether an officer, manager, general agent, director or trustee, employee, or other person, has refused to be examined under oath by the director concerning its affairs, whether in this state or elsewhere; and after reasonable notice of the fact, the insurer has failed promptly and effectively to terminate the employment and status of the person and all his influence on management;

(6) After request by the director pursuant to section 374.190, RSMo, or pursuant to the provisions of sections 375.1150 to 375.1246, the insurer has failed to promptly make available for examination any of its own property, books, accounts, documents, or other records, or those of

any subsidiary or related company within the control of the insurer, or those of any person having executive authority in the insurer so far as they pertain to the insurer;

(7) Without first obtaining the written consent of the director, the insurer has transferred, or attempted to transfer in a manner contrary to section 375.241 or sections 382.040 to 382.060, RSMo, substantially its entire property or business, or has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person;

(8) The insurer or its property has been or is the subject of an application for the appointment or a receiver, trustee, custodian, conservator or sequestrator or similar fiduciary of the insurer or its property otherwise than as provided under the insurance laws of this state, or such appointment has been made or is imminent;

(9) Within the previous three years the insurer has willfully violated its charter or articles of incorporation, its bylaws, any insurance law of this state, or any valid order of the director under section 375.1160 or 375.1162;

(10) The insurer has failed to pay within sixty days after due date any obligation to any state or any subdivision thereof or any judgment entered in any state, if the court in which such judgment was entered had jurisdiction over such subject matter except that such nonpayment shall not be a ground until sixty days after any good faith effort by the insurer to contest the obligation has been terminated, whether it is before the director or in the courts, or the insurer has systematically attempted to

compromise or renegotiate previously agreed settlements with its creditors on the ground that it is financially unable to pay its obligations in full;

(11) The insurer has failed to file its annual report or other financial report required by law within the time allowed by law;

(12) The board of directors or the holders of a majority of the shares entitled to vote, or a majority of those individuals entitled to the control of the insurer request or consent to rehabilitation under sections 375.1150 to 375.1246.

Mo.Rev.Stat. § 375.1176.

1. An order to liquidate the business of a domestic insurer shall appoint the director and his successors as liquidator and shall direct the liquidation forthwith to take immediate possession of the assets of the insurer and to administer them subject to the supervision of the court until the liquidator is discharged by the court. The liquidation of any insurer shall be considered to be the business of insurance for purposes of application of any law of this state. The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the order of liquidation. The order shall require the liquidator to take immediate possession of and to secure all of the records and property of the insurer wherever it is located, and to take all measures necessary to preserve the integrity of the insurer's records. The filing or recording of the order with the clerk

of the court and the recorder of deeds of the county in which its principal office or place of business is located or, in the case of real estate, with the recorder of deeds of the county where the property is located, shall impart the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that recorder of deeds would have imparted.

Mo.Rev.Stat. § 375.1188

1. Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or in equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order. The courts of this state shall give full faith and credit to injunctions against the liquidator or the company or the continuation of existing actions against the liquidator or the company, when such injunctions are included in an order to liquidate an insurer issued pursuant to corresponding provisions in other states. Whenever, in the liquidator's judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside this state, he may intervene in the action. The liquidator may defined any action in which he intervenes pursuant to this section at the expense of the estate of the insurer.

RELEVANT PROVISION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 626(c)(1)

Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the secretary to enforce the right of such employee under this Act.

IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

JAY ANGOFF, Director Department of Insurance State of Missouri, Plaintiff,	)	
v.	)	Case Number CV94-2451
PROFESSIONAL MEDICAL INSURANCE COMPANY, and PROFESSIONAL MUTUAL INSURANCE COMPANY RISK RETENTION GROUP, Defendants.	)	

ORDER OF REHABILITATION

Upon the Verified Petition of Plaintiff in the above-captioned case and the Waiver of Service of Process and Consents to Rehabilitation filed by Defendants it is hereby ORDERED, ADJUDGED and DECREED that:

1. Defendants Professional Mutual Insurance Company Risk Retention Group and Professional Medical Insurance Company have consented to the entry of this Order.

2. Plaintiff Jay Angoff, Director of the Missouri Department of Insurance and his successor or successors in office, is appointed Rehabilitator of Defendants with all powers and duties attendant thereof until further order of this Court.

3. The title and right to possession of Defendants' books, papers, records, property and assets, of whatsoever kind of nature, is vested in Plaintiff as Rehabilitator of Defendants, pursuant to the supervision of this Court.

4. Plaintiff shall forthwith proceed to conduct the business of Defendants and take all proper steps to remove the causes and conditions which have made these proceedings necessary, subject, however, to the orders of this Court.

5. Plaintiff may, subject to the approval and direction of the Court, sell and dispose of Defendants' property, may borrow money on the security of such property, may execute in his own name as Rehabilitator all necessary and proper instruments and conveyances, and may as Rehabilitator maintain and defend all actions in the courts of this or any state or states of the United States relating to such companies, their assets, business and liabilities.

6. Plaintiff shall make an accounting to this Court as required by Section 375.1166, RSMo Cum. Supp 1993, to be filed as follows for so long as this order of rehabilitation is in effect: within sixty (60) days after the close of the six month period ending next preceeding [sic], beginning with the six months ending June 30, 1994.

7. Plaintiff is authorized to hire, retain and terminate employees as needed to effectuate the Rehabilitation of Defendants and to negotiate the terms of such employment relations.

8. Plaintiff is authorized to contract with independent contractors, including but not limited to attorneys, to perform services as needed to effectuate the rehabilitation of Defendants.

9. Plaintiff is authorized to transfer, invest, re-invest and otherwise deal in the assets and property, real or personal, of Defendants so as to effectuate the rehabilitation of Defendants.

10. Plaintiff is authorized to file suit, make claims, arbitrate, settle or take other legal action in pursuit of the interest of the rehabilitation.

11. Plaintiff is authorized to do all things necessary to effectuate the rehabilitation of Defendants.

12. Defendants are hereby ordered to surrender and/or make available to the Plaintiff all books and records of Defendants.

13. Defendants shall, at the request of Plaintiff, cause or aid in the transfer of the assets of Defendants.

14. Defendants shall make their books and records as pertain to Defendants availabe [sic] to Plaintiff for inspection.

15. This order shall not constitute an anticipatory breach of any contracts of the insurer, nor shall it be grounds for retroactive revocation or cancellation of any contracts of the insurer, unless such revocation or cancellation is made by the rehabilitator pursuant to RSMo §375.1168.

So ordered at KC, on this 7th day of Feb., 1994.

/s/ Lee E. Wells
Judge

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

IN THE MATTER OF THE REHABILITATION OF PROFESSIONAL MEDICAL INSURANCE COMPANY, and PROFESSIONAL MUTUAL INSURANCE COMPANY RISK RETENTION GROUP, JAY ANGOFF, Director of the Department of Insurance of the State of Missouri, AS REHABILITATOR Plaintiff, v. PROFESSIONAL MEDICAL INSURANCE COMPANY, and PROFESSIONAL MUTUAL INSURANCE COMPANY RISK RETENTION GROUP, Defendants.	Case No. CV94-2451-LSW

ORDER OF LIQUIDATION

Upon the Petition for Liquidation and Appointment of Permanent Special Deputy Receiver filed by Plaintiff in the above-captioned case, and the Court having been fully advised in the premises, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Professional Medical Insurance Company (hereafter "ProMed") is hereby declared insolvent.

2. Professional Mutual Insurance Company Risk Retention Group (also hereafter "ProMed") is hereby declared insolvent.

3. Jay Angoff, Director of the Department of Insurance and his successor or successors in office, is appointed Liquidator of Defendant with all powers and duties attendant thereof until further order of this Court.

4. The Court hereby approved the Director's appointment of Cynthia Clark Campbell as the Special Deputy Receiver of ProMed with all powers of the Liquidator granted by §§ 375.11-75-375.1230.

5. The Receiver is ordered to immediately cease the payment of claims, and to the extent the payment of claims has already ceased, such cessation is hereby ratified and approved by this Court.

6. The Receiver shall immediately take title to all of the property, contracts and rights of action, and all of the books and records of ProMed, wherever located, as of the date of the entry of this order.

7. The Receiver shall take all measures necessary to preserve the integrity of ProMed's records.

8. ProMed is perpetually enjoined from the further prosecution of its business.

9. The present and former officers, directors, agents and employees of ProMed are and continue to be permanently enjoined and restrained from selling, assigning or disposing of the business or of any of the assets of ProMed.

10. All of the creditors and claimants of ProMed, wherever situated, be and are hereby restrained and enjoined from levying any execution, garnishment or attachment on the property and assets of ProMed.

11. All persons, wherever situated, are permanently enjoined and restrained from prosecuting or bringing any action, issuing any process or obtaining any judgment against ProMed or its properties or assets.

12. All persons, wherever situated are hereby enjoined from interference with the possession, title or rights of petitioner as receiver in liquidation in and to the assets of ProMed and from interference with the conduct of the liquidation of ProMed except as may be ordered by the Court.

13. The Receiver is authorized to hire, retain and terminate employees as needed to effectuate the winding up and liquidation of ProMed and to negotiate the terms of such employment relations.

14. The Receiver is authorized to contract with independent contractors, including but not limited to attorneys, to perform services as needed to effectuate the winding up and liquidation of ProMed.

15. The Receiver is authorized to transfer, invest, reinvest, and otherwise deal in the assets and property, real or personal, of ProMed so as to effectuate the winding up and liquidation of ProMed.

16. The Receiver is authorized to file suit, make claims, arbitrate, settle or take other legal action in pursuit of the interests of the liquidation.

17. The Receiver is authorized to do all things necessary to effectuate the winding up and liquidation of ProMed pursuant to RSMo. §§ 375.1182 and 375.1184. Receiver shall make an accounting to this Court as required by RSMo. § 375.1200, to be filed as follows for so long as this Order of Liquidation is in effect: sixty (60) days after the close of the six-month period ending next preceding [sic], beginning with the six-months ending December 31, 1994.

So ordered this 7th day of April, 1994.

/s/ Lee E. Wells
THE HONORABLE LEE E. WELLS

A TRUE COPY - ATTEST
CIRCUIT COURT OF JACKSON COUNTY, MO
COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF CIVIL RECORDS

BY /s/ Kathleen S. Olson DCA

MAR 12 1997

No. 96-1252

(2)

In The

Supreme Court of the United States

October Term, 1996

PROFESSIONAL MEDICAL INSURANCE COMPANY; PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION,

Petitioners,

vs.

G. THOMAS MURFF,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* TRANSIT CASUALTY COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF PROFESSIONAL MEDICAL INSURANCE COMPANY AND PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Transit Casualty Company (Transit) moves the Court to enter its order granting Transit leave to file an *amicus curiae* brief in support of the petition for writ of certiorari of Professional Medical Insurance Company and Professional Medical Risk Retention Group, in Liquidation (ProMed) filed with the United States Supreme Court on February 10, 1997.

Consent for leave to file an *amicus curiae* brief has been sought from all parties. Petitioner ProMed has, by and through its counsel, consented. Respondent G. Thomas Murff (Murff) has denied consent.

Transit, as movant, has a significant interest in the outcome of this case. Transit was incorporated under the laws of the State of Missouri in 1945 and was authorized to issue policies in all fifty states. On December 3, 1985, the Circuit Court of Cole County, Missouri (State Court) declared Transit insolvent pursuant to Mo. Rev. Stat. § 375.660 (Vernon 1985) and the Amended Liquidation Order issued on that date.

Transit is the largest property and casualty insurance insolvency in United States history. It is also the largest and controlling creditor of the largest insurance insolvency in British history. Since the Transit liquidation is governed by the Missouri insurance insolvency code, the decision of the Eighth Circuit will have a significant effect on the future conduct of the Transit liquidation. Given Transit's status in the United States and overseas insurance markets, the Eighth Circuit's decision could affect the entire insurance insolvency arena to the detriment of

United States policyholders, by allowing reinsurers to escape their obligations to insolvent insurers.

Transit's special deputy receiver and his staff are engaged in two principal activities: (1) the review, allowance and payment of claims submitted by policyholders and third-party claimants, and (2) the collection of reinsurance monies due Transit relating to those claims from some 900 reinsurers located in the United States and in thirty foreign countries.

Transit insured many policyholders that have long-tail claims involving asbestos bodily injury and property damage, medical device implants (heart valves and breast implants), HIV infected blood products, environmental sites and so on. Transit issued this long-tail coverage from 1978 to 1985. Many of the claims have taken over a decade to develop.

By State Court order, Transit sent out over 300,000 proofs of claim (POCs) forms to insureds, claimants, reinsurers, agents or attorneys for insureds, brokers, finance companies (on return of premium), state guaranty funds, ancillary receivers, attorneys for third-party claimants, general creditors, vendors and government tax authorities. Transit has received approximately 200,000 notices of claim or POCs from these various parties.

Reinsurance recoveries are the principal asset of the Transit estate. To date, Transit has marshalled over $700 million in assets. Transit's collection efforts increase the funds available to pay claims of policyholders and third-party claimants. Thus, asset collection is one of the most important aspects of the liquidation process. Transit has settled with approximately 350 reinsurers, but still has

outstanding claims against approximately 400 to 450 reinsurers.

Transit also has an appeal pending before the Eighth Circuit in *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, No. 96-2532 (*Lloyd's*), in which the Eighth Circuit will again be considering the three-part test articulated by this Court in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993) (*Fabe*). Among other things, the Eighth Circuit has been asked to determine whether the McCarran-Ferguson Act saves the anti-arbitration provision of Mo. Rev. Stat. § 375.1188(1) (Vernon 1991) from preemption by the federal statutes implementing the Convention on Recognition and Enforcement of Foreign Arbitral Awards (Convention), June 10, 1958, 21 UST 2517, TIAS No. 6997.

Transit was not a party to the suit instituted in the United States District Court for the Western District of Missouri, entitled *Murff v. Professional Medical Ins. Co., et al.*, No. 94-0164-CV-W-8 (*Murff*), that gives rise to the order which Petitioner ProMed now seeks to have reviewed by the Supreme Court on the petition for writ of certiorari.

Transit agrees, however, that the Eighth Circuit in requiring "substantial impairment" of the liquidator's ability to liquidate the insurer has applied a test not applied in the other circuit courts. In *Murff*, the Eighth Circuit interpreted the same statute at issue in the *Lloyd's* litigation – Mo. Rev. Stat. § 375.1188(1) (Vernon 1991).

Thus, the Eighth Circuit's decision could have a significant effect on how other provisions of the same statute are interpreted.

Transit believes that ProMed's petition for writ of certiorari presents an important and substantial question of federal law which has not been settled by this Court: What is the appropriate test for determining whether a federal statute impairs, invalidates, or supersedes a state law regulating the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1996)? This issue is deserving of the time and resources necessary for this Court to decide the case. The *Murff* decision is of substantial importance to the state insurance insolvency receivers and appointed special deputy receivers who are charged under the laws of the fifty states with the supervision, rehabilitation and liquidation of insolvent insurance companies. Any decision in this case would substantially affect insurance insolvency proceedings, the number of which has been significant in the last twenty years. A.M. Best, an insurance company rating service, reported that 372 property-casualty insurers became insolvent in the United States between 1969 and 1990. *See* A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers, 1969-1990* 1-2 (June 1991). In addition, many insurance insolvencies have occurred overseas that directly affect the insolvencies in the United States.

The *Murff* decision further expands the division among the circuit courts that have attempted to apply the third part of the three-part test articulated in *Fabe*. Thus, similarly situated insurance insolvencies subject to similar state regulatory schemes are being treated differently

as a result of this conflict to the detriment of policyholders and other creditors of insolvent insurers.

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Attorneys for Amicus Curiae Transit Casualty Company in Receivership

QUESTIONS PRESENTED

1. Does the McCarran-Ferguson Act permit a federal statute, not specifically relating to the business of insurance, to "invalidate, impair, or supersede" a state statute regulating the business of insurance so long as the negation of the state statute does not "substantially impair" the entire state regulatory scheme, as held by the Eighth Circuit in a decision which exacerbates the clear conflict already existing between the decisions of the First, Fourth, Sixth, Seventh, and Ninth Circuits, with respect to a question which remains unsettled by this Court?

2. Does the McCarran-Ferguson Act permit the federal court to hear Respondent's federal age discrimination claims against Petitioner insolvent insurers, divesting the receivership court of its exclusive jurisdiction over all claims involving the insolvents, and overriding the receivership court's order to stay all litigation against the insolvents, pursuant to Missouri's comprehensive scheme for the regulation of the business of insurance?

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BRIEF OF *AMICUS CURIAE*

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-10) is reported as *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996). The order of the Court of Appeals denying ProMed's petition for rehearing is unreported (Pet. App. 23). The decision of the United States District Court for the Western District of Missouri dismissing respondent Murff's claim is also unreported (Pet. App. 11-22).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND STATE STATUTES INVOLVED

The relevant section of the McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996), provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

The stay provision of Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo. Rev. Stat. § 375.1188(1) (Vernon 1991), provides:

> Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order.

The jurisdictional provision of Missouri's Insurers Supervision, Rehabilitation and Liquidation Act, codified at Mo. Rev. Stat. § 375.1154(6) (Vernon 1991), provides:

> All actions herein authorized shall be brought in the circuit court of Cole County or any other county where the principal office of the insurer is or was last located, and venue of all proceedings and cases ancillary or related to such actions shall be proper in said court.

The jurisdictional provision of the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. § 626(c)(1) (1996), provides:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. . . .

SUMMARY OF ARGUMENT

Missouri has a comprehensive, self-contained and exclusive insurance insolvency code. It sets forth the substantive law and procedures to be followed in insurance insolvencies. The intent of Mo. Rev. Stat. § 375.1188(1) (Vernon 1991) of the code is to consolidate actions against an insolvent insurer in the receivership court, especially when the claims are for assets of the estate.

In *Murff*, the Eighth Circuit found that § 375.1188(1) (Vernon 1991) was not saved from pre-emption under the McCarran-Ferguson Act by 29 U.S.C. § 626(c)(1) (1996). The federal statute permits suit in any court of competent

jurisdiction. The Eighth Circuit found that the third part of the *Fabe* three-part test was not satisfied because the federal statute did not "substantially impair[ ]" the "receiver's ability to effect [the insurer's] liquidation." This requirement is not found in the McCarran-Ferguson Act, the decisions of this Court or the decisions of the other circuit courts. The focus, instead, should be on whether the state law itself is invalidated, impaired or superseded by the federal law.

ARGUMENT

Missouri has had a comprehensive insurance insolvency code since at least 1909. *See* Mo. Rev. Stat. §§ 7076 to 7097 (1909).[1] In *William Blair Realty Partners, III v. Transit Casualty Co.*, 900 S.W.2d 671, 675-676 (Mo. App. 1995), a unanimous panel of the Missouri Court of Appeals recently confirmed that the Missouri insurance insolvency code is "a self-contained and exclusive statutory scheme." The appellate court held: "The statutory provisions of the Missouri insolvency law govern the administration of the assets of an insolvent insurer, and

[1] This code was substantially revised in 1939 (§§ 5812 and 6048 to 6070, RSMo 1939). In 1991, 1992 and 1996, the provisions were again substantially amended. *See* H.B.No. 385, 86th Leg., 1st Sess., 1991 Missouri Laws; H.B. No. 1574, 86th Leg., 2nd Sess., 1992 Missouri Laws; and S.B. 896, 88th Leg., 2nd Sess., 1996 Missouri Laws.

the trial court must administer the insolvent estate in accordance with these statutory provisions." *Id.* The insurance insolvency statutes "prevail over any general statutes or common law because the legislature has set forth the substantive law and procedures to be followed." *Id.* at 676. *See also State ex rel. ISC Fin. Corp. v. Kinder*, 684 S.W.2d 910, 913 (Mo. App. 1985); *Medallion Ins. Co. v. Wartenbee*, 568 S.W.2d 599, 601 (Mo. App. 1978); *O'Malley v. Prudential Casualty & Sur. Co.*, 80 S.W.2d 896, 897 (Mo. App. 1935).

Mo. Rev. Stat. § 375.1188(1) (Vernon 1991) of the Missouri Insurers Supervision, Rehabilitation and Liquidation Act prohibits any "action at law or equity or in arbitration against the insurer or liquidator. . . . " once an order issues appointing a liquidator for the insurer. The intent of this statute is to consolidate actions in the state receivership court in order to efficiently, economically and equitably resolve claims against the assets of the insolvent's estate. *See, e.g., Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254 (5th Cir. 1990) (reinsurance proceeds are assets of Transit which must be claimed in the Missouri liquidation court) (applying Missouri law).

In *Fabe*, this Court developed a three-part test for analyzing the reverse preemption rule found in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1996). Under this three-part test, the federal law will control only if the following are true: (1) the federal statute "specifically relate[s]" to the business of insurance, or (2) the state law was not "enacted for the purpose of regulating the business of insurance," or (3) the state law was enacted for that purpose, but the federal law does not

"invalidate, impair or supersede" the state law. *Fabe*, 508 U.S. at 501.

In interpreting the third-part of the *Fabe* three-part test, the Eighth Circuit required a "substantial impairment" of the "receiver's ability to effect [the insurer's] liquidation under the Insolvency Act" in order for the federal statute to "run afoul of the proscriptions of the McCarran-Ferguson Act." *Murff*, 97 F.3d at 292. This requirement does not appear in the McCarran-Ferguson Act, which requires only that the federal law "invalidate, impair, or supersede any law enacted by any state." Nor is the "substantial impairment" requirement found in this Court's decisions interpreting the McCarran-Ferguson Act. The "substantial impairment" requirement also goes far beyond the other circuits' formulation of the third-part of the *Fabe* test. *See, e.g., Villafane-Nerziz v. Fed. Deposit Ins. Corp.*, 75 F.3d 727, 735-736 (1st Cir. 1995); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45-46 (2d Cir. 1995); *Kenty v. Bank of Columbus*, 92 F.3d 384, 392-393 (6th Cir. 1996); *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 296-297 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995).

Moreover, under this articulation of the third part of the *Fabe* three-part test, resolution of the preemption issue may depend on the individual nature, complexity and size of each insurance insolvency. The Eighth Circuit's test focuses on the liquidator's ability to liquidate the insurer despite the operation of the federal law, rather than considering whether the state law itself is invalidated, impaired or superseded by the federal law.

In *Transit Casualty Co. v. Certain Underwriters at Lloyds of London*, No. 96-2532, Transit filed suit against Lloyds in the Missouri liquidation court for reinsurance recoverables. Lloyds removed the case to the United States District Court for the Western District of Missouri, and there sought to compel arbitration pursuant to the Convention On the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (1996).

In a decision predating the Eighth Circuit's decision in *Murff*, the District Court found that requiring Transit's Receiver to arbitrate his disputes with Lloyd's would "impair, invalidate and supersede" Missouri statutes expressly prohibiting the enforcement of agreements to arbitrate against receivers of insolvent insurers. *Transit Casualty Co. v. Certain Underwriters at Lloyds of London*, No. 96-2532, slip op. at 5 (W.D. Mo. June 10, 1996). Lloyd's appeal is pending.

The intervening *Murff* decision, issued in October 1996, threatens this result because it holds that the divesture of the jurisdiction of the Missouri liquidation court over claims by and against the insolvent Transit does not "substantially impair the receiver's ability to effect [Transit's] liquidation under the Insolvency Act." *Murff*, 97 F.3d at 292. A prompt determination of the issues presented by ProMed's Petition would clarify the third prong of the *Fabe* test, resolve the issues presented by Lloyd's appeal, and benefit the Transit estate, which still has outstanding claims against approximately 350 to 400 reinsurers across the nation and worldwide.

Estates with numerous claimants such as ProMed and Transit could expend considerable estate assets if forced to prosecute litigation with creditors and claimants in a multitude of states and foreign countries. This far-flung litigation again raises the prospect of conflicting interpretations of the Missouri insurance insolvency code, considerable expense to the estate, a wasting of estate assets otherwise payable to policyholders and third-party claimants, inequitable treatment of claimants, and the payment of preferential offset payments to reinsurers that are inconsistent with the distribution statute.

CONCLUSION

It is respectfully submitted that the decision of the Eighth Circuit Court of Appeals was incorrect in several respects, most of which are more fully addressed in the petition for writ of certiorari submitted by ProMed. The United States Supreme Court should grant certiorari and resolve the conflict in the circuits on this extremely important issue affecting the insurance industry as a whole and insolvent insurers specifically. The decision of the Eighth Circuit Court of Appeals has a far-reaching,

negative impact on insolvents' policyholders, who, after all, are the most deserving parties of all.

Respectfully submitted,

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MAR 12 1997

In The

Supreme Court of the United States

October Term, 1996

PROFESSIONAL MEDICAL INSURANCE COMPANY; PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION,

Petitioners,

vs.

G. THOMAS MURFF,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF INTERNATIONAL ASSOCIATION OF INSURANCE RECEIVERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF PROFESSIONAL MEDICAL INSURANCE COMPANY AND PROFESSIONAL MEDICAL RISK RETENTION GROUP, IN LIQUIDATION

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The International Association of Insurance Receivers respectfully moves for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by Petitioners, Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation. The *amicus curiae* brief is printed herewith in accordance with Rule 37 of the *Rules of the Supreme Court.*

ISSUE OF CONSENT

Ms. Cynthia Clark Campbell, the appointed deputy receiver of Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation has consented, on behalf of Petitioners to the filing of an *amicus curiae* brief. Mr. Kelly McClelland on behalf of Respondent, G. Thomas Murff refused to consent to the filing of an *amicus curiae* brief.

INTEREST OF MOVANT

The International Association of Insurance Receivers ("IAIR") is a nonprofit corporation whose membership is comprised of the receivers of insolvent insurance companies across the nation and overseas. IAIR was formed in order to enhance the standards governing insurance company receiverships. One of IAIR's stated purposes and objectives is to serve the public by promoting high

standards in the administration of insurance receiverships and the prompt and efficient closing of receiverships.

The issues raised by this case directly affect every insolvent insurer in this nation. The decision of the U.S. Court of Appeals for the Eighth Circuit has added to the existing confusion for determining when a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance for purposes of analysis under the McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996). At present, six of the Courts of Appeals have formulated four different tests to apply in making such a determination, with resulting disparate outcomes. As such, state laws regulating the business of insurance receive unequal protection from preemption by federal law, and insolvent insurers are not treated uniformly by the federal courts. IAIR's interest is to ensure that the confusion under which insurance receivers are forced to administer estates is resolved.

RELEVANCY OF BRIEF

The United States Court of Appeals for the Eighth Circuit held in this case that the congressional grant of concurrent jurisdiction over certain claims under the Age Discrimination in Employment Act divests the Missouri receivership court of its exclusive jurisdiction over claims by and against an insolvent insurer. IAIR is concerned that issues of asserted jurisdiction, invoked by claimants against insolvent insurers, should be resolved under state

insurance statutes that provide for the exclusive jurisdiction of state receivership courts. IAIR's brief explains that the present uncertain application of the McCarran-Ferguson Act by the various Courts of Appeals has the debilitating effect of dissipating estate assets, ultimately preserved for distribution to policyholders. Thus, IAIR's brief seeks to focus this Court's attention on the broader implication of the Court of Appeals for the Eighth Circuit's ruling: the harm caused to the public interest by the uncertain application of the McCarran-Ferguson Act to state insurance statutes.

CONCLUSION

IAIR respectfully requests leave to file the attached *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed by Petitioners, Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation.

Respectfully submitted,

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March 12, 1997

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BRIEF OF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The International Association of Insurance Receivers ("IAIR") is a nonprofit corporation whose membership is comprised of the receivers of insolvent insurance companies across the nation and overseas. IAIR was formed in 1991 to enhance the standards governing insurance company receiverships. One of IAIR's stated purposes and objectives is to promote high standards in the administration of insurance receiverships and the prompt and efficient winding up of insurance companies.

IAIR's purposes and objectives are effected by the consistent application of state laws regulating the business of insurance to insurance receiverships. The decision of the Eighth Circuit has hampered these objectives by: (i) adding a new and fourth rationale for determining when a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance for purposes of analysis under the McCarran-Ferguson Act (1945), codified at 15 U.S.C. § 1012(b) (1996);[1] and (ii) depriving the liquidation court of its essential ability to marshal the estate's limited resources by controlling the processing of claims against the company in liquidation. As a result, state insurance receivers must administer estates with the knowledge that claims brought against

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[1] The McCarran-Ferguson Act provides in relevant part: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

them will be resolved differently, depending upon the origin of the claim and with the resulting increased cost of resolving claims in numerous federal and state courts. IAIR thus urges this Court to grant the petition of Professional Medical Insurance Company and Professional Mutual Risk Retention Group, in Liquidation (collectively "ProMed") for a writ of certiorari to review the judgment of the Eighth Circuit entered on October 4, 1996.

SUMMARY OF ARGUMENT

State insurance receivers across the nation labor under the uncertainty created by the various Courts of Appeals' inconsistent approaches to determining when a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance for the purposes of the McCarran-Ferguson Act.

In *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996), the Eighth Circuit held that the congressional grant of concurrent jurisdiction over claims, brought under the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. § 621 *et seq.*, divested the Missouri receivership court of its exclusive jurisdiction over claims, by and against an insolvent insurer. This decision was predicated on a test formulated by that Court, which considered, for McCarran-Ferguson purposes, the degree to which the federal law's impairment of the state regulatory statute impacted on the overall state regulatory scheme. This expression of the third prong of the test articulated in *United States Dep't of*

Treasury v. Fabe, 508 U.S. 491 (1993), preserves from federal pre-emption only those state insurance laws deemed by the court to be sufficiently central to the state regulatory scheme.

This test conflicts with the tests adopted by: (i) the First, Seventh and Ninth Circuits; (ii) the Sixth Circuit; and the (iii) Fourth Circuit, and adds to the uncertain application of the McCarran-Ferguson Act to state insurance statutes. Insurance receivers across the nation require this Court to resolve the division among the Courts of Appeals regarding the manner in which to apply the third prong of the test articulated in *Fabe*.

Insurance receivers are also charged by state insolvency acts to administer their estates under the jurisdiction of one state court. The grant of exclusive state jurisdiction allows receivers to resolve claims, efficiently and effectively, without resorting to the expense of disputing claims in state and federal courts nationwide. Receivers' ability to resolve claims in one receivership court avoids piecemeal litigation and reduces the estate's costs, advancing the preservation of estate assets for distribution to creditors and policyholders.

By divesting the state receivership court of exclusive jurisdiction, the Eighth Circuit's holding adversely impacts insurance receiverships by increasing the likelihood of piecemeal litigation with its accompanying increased costs and administrative uncertainty.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEALS

By further expanding the division among the Courts of Appeals regarding the manner in which to apply the third prong of the test articulated in *Fabe*, the decision of the Eighth Circuit adds to the existing confusion under which state insurance receivers administer insolvent estates.

Specifically, while acknowledging that the Missouri's Insurers Supervision, Rehabilitation and Liquidation Act (the "Insolvency Act") provides a comprehensive scheme for the winding up of insolvent insurance companies and vests exclusive jurisdiction over actions by or against the insolvent insurer in the state receivership court (Mo. Rev. Stat. § 375.1188(1)), the Eighth Circuit held that the federal Age Discrimination in Employment Act ("ADEA") could be construed to invalidate, impair, or supersede the Insolvency Act so long as the ADEA's application did not work a substantial impairment of the overall state insurance regulatory scheme.

> As we see it, however, the adjudication of an ADEA claim in federal court would not so substantially impair the deputy receiver's ability to

> effect ProMed's liquidation under the Insolvency Act as to run afoul of the proscriptions of the McCarran-Ferguson Act.

Pet. App. 8.

As discussed in ProMed's Petition, the Eight Circuit's decision exacerbates an already existing division among the Courts of Appeals by formulating yet another standard for determining whether a federal statute invalidates, impairs, or supersedes a state law regulating the business of insurance. *See* ProMed's Petition at 10-20 *citing Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996) (federal legislation subject to McCarran-Ferguson only "where the federal law expressly prohibit[s] acts permitted by state law or vice versa."); *Merchants Home Delivery Servs., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995) (same); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (state and federal laws proscribing identical conduct do not directly conflict with or displace each other, and may coexist under McCarran-Ferguson); *Kenty v. Bank One, N.A.*, 92 F.3d 384 (6th Cir. 1996) (Ohio statutes providing detailed regulations and remedies for unfair and deceptive acts occupy the field, supplanting federal RICO statute prohibiting identical conduct but prescribing different remedies); *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996) (application of federal RICO statute precluded because it would invalidate, impair and supersede enforcement of state insurance code prohibition of identical conduct). *Cf. Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996) (state

statute regulating the business of insurance and providing for exclusive state court jurisdiction of claims against insolvent insurance companies may be preempted by federal law so long as exercise of federal jurisdiction would not substantially impair the ability to effect the insolvent insurer's liquidation).

Although the inconsistent standards developed by the various Courts of Appeals affect the regulation of insurance generally, they pose particular potential harm to the regulation and administration of insurer insolvencies. Because insurance companies often issue insurance policies nationwide, the receiver of any given insolvent insurer is potentially subject to federal jurisdiction in any federal district court, for claims brought against the insolvent estate. The various provisions of Missouri's Insolvency Act, and those of other states, would be preempted, or not, depending upon the district court in which the claimant commences suit.

Thus, to avoid negation of a state law regulating the business of insurance, a receiver haled into a federal district court in the Fourth Circuit will have to show that the federal statute would "invalidate, impair, or supersede"[2] the state insurance law. A receiver haled into a federal district court in the Sixth Circuit will have to show that the federal law requires a "different standard of conduct"[3] than what is required by the state insurance law. A receiver haled into a federal district court in the

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[2] *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996).

[3] *Kenty v. Bank One, N.A.*, 92 F.3d 384 (6th Cir. 1996).

First, Seventh or Ninth Circuits will have to show that the federal law "directly conflicts"[4] with the state law by "expressly prohibiting acts permitted by state law or vice versa."[5] A receiver haled into a federal district court in the Eighth Circuit will have to show not only that the federal law directly conflicts with a given state law, but that the federal law does so in a way that substantially impairs the overall regulatory scheme.[6]

As a result, state laws regulating the business of insurance receive disparate protection from preemption by federal law, and insolvent insurers are not treated uniformly by the federal courts. Resolution of the conflicts among the Courts of Appeals would encourage consistent rulings as to the applicability of the state insurance insolvency statutes (and other laws enacted for the purpose of regulating the business of insurance) of the fifty states.

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[4] *Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996); *Merchants Home Delivery Servs., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

[5] *Merchants Home Delivery Servs., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 116 S. Ct. 418 (1995).

[6] *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996).

II.

IN IGNORING MISSOURI'S DETERMINATION THAT THE ORDERLY RESOLUTION OF THE AFFAIRS OF INSOLVENT INSURERS REQUIRES A SINGLE FORUM FOR THE DISPOSITION OF CLAIMS AGAINST THE ASSETS OF THE ESTATE, THE EIGHTH CIRCUIT HAS IMPAIRED THE RECEIVERSHIP COURT'S ABILITY TO CARRY OUT ITS PURPOSE

The Eighth Circuit's decision, by divesting the state receivership court of its exclusive jurisdiction, leaves insurance receivers open to claims in every federal and state court in the nation. The additional administrative expense of defending numerous lawsuits in numerous states will dissipate estate assets otherwise marshalled for distribution to creditors and policyholders.

This Court has recently reaffirmed that the purpose of the McCarran-Ferguson Act is "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance" – first by "removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised" and second by "declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the law of the several states . . . "; *Fabe*, 508 U.S. at 500, *citing Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). The State of Missouri has determined – as Congress authorized it to do – that a stay of all competing litigation is an essential component of the insurance liquidation process and that

the Missouri receivership court shall have exclusive jurisdiction to determine all claims against the insolvent.

Thus, the Eighth Circuit's decision is in conflict with numerous federal and state cases which uphold the exclusivity of jurisdiction of state receivership courts. The Eighth Circuit itself had previously recognized that state courts retain exclusive jurisdiction over claims against insolvent insurance companies:

> Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be entrusted to a management under the supervision of a single court. Hence other courts, except when called on by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for insolvent insurance companies.

Motlow v. Southern Holdings & Sec. Corp., 95 F.2d 721, 725-26 (8th Cir.), *cert. denied*, 305 U.S. 609 (1938).

Other federal courts have also recognized the primacy of states' insolvency act provisions providing for exclusive state receivership court jurisdiction. *See Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (McCarran-Ferguson Act prohibits federal preemption of Kentucky Insolvency Act's exclusive jurisdiction provision); *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D.N.Y. 1989) ("To permit resort to the removal statute to extricate this case from state court jurisdiction would 'impair, invalidate or supersede' New York's law

requiring a unified proceeding in the state court and would accordingly violate McCarran-Ferguson").

In *United States Fin. Corp. v. Warfield*, 839 F. Supp. 684 (D. Ariz. 1993), the court held that Arizona's exclusive jurisdiction statute was protected by the McCarran-Ferguson Act, holding that enforcement of the state's exclusive jurisdiction:

> aid[s] receivership courts in marshalling all the insurance company's assets into one forum where they most efficiently can be monitored, preserved, and eventually distributed to deserving insureds and beneficiaries. The provisions are an integral part of Arizona's scheme for regulating insolvent insurers and ensure efficacy of Arizona's statutory provisions that detail the administrative process through which claims against the insurer are submitted to the receiver and evaluated by the receiver and the receivership court. This process presumably is intended to and does conserve insurance company assets for ultimate payment to policyholders as well as other creditors. *Cf. Fabe*, ___ U.S. ___, 113 S.Ct. at 2212 (holding that "the preference accorded by Ohio to expenses of administering the insolvency proceeding is reasonably necessary to protect policyholders"). The provisions further serve the specific purpose of protecting receivers from having to litigate in multiple forums, which might lead to a depletion of the insurance company's assets, and ensure that questions relevant to Arizona's statutory scheme are resolved by Arizona courts.

839 F. Supp. 684, 689 (D. Ariz. 1993).

Many state courts have also held that exclusive jurisdiction by the insolvency court over claims against the insolvent insurer is necessary for the preservation of estate assets and protection of policyholders. In *Superintendent of Ins. v. International Equipment Leasing, Inc.*, 247 N.J. Super. 119, 128, 588 A.2d 883, 888 (1991), the court dismissed a suit against the liquidator of a New York insurance company. It relied on the need for exclusive jurisdiction vested in receivership courts:

> There is no reason for making the administration of an insolvent insurance company's estate by the court of the state where liquidation proceedings commenced subject to the jurisdiction of other courts. The reasons for noninterference are compelling. *By adopting the Act, the Legislature intended to secure the economical, efficient and orderly liquidation and distribution of the assets of defunct corporations for the benefits of all creditors and stockholders. To achieve the legislative intent, it is essential that title, custody and control of the assets be entrusted to a single management under the supervision of one court.*

Id. at 128 (emphasis supplied). *See also Insurance Comm'r v. Arcilio*, No. 187813, 1997 WL 9738 (Mich. Ct. App. January 10, 1997) (pursuant to McCarran-Ferguson, the Michigan Insolvency Act pre-empts any federal right to certify a class action under Fed. R. Civ. P. 23); *Baldwin-United Corp. v. Garner*, 283 Ark. 385, 393, 678 S.W.2d 754, 758 (1984), *cert. denied*, 471 U.S. 1111 (1985) (McCarran-Ferguson Act preserves injunction issued pursuant to Arkansas Insolvency Act, prohibiting bankrupt plaintiff from suing insolvent insurer in federal bankruptcy court).

The Eighth Circuit's divesture of the exclusive jurisdiction of state receivership courts will increase the costs of administering insolvent estates by adding the costs of defending myriad claims in myriad courts. A multiplicity of proceedings in different state and federal courts will also potentially result in contradictory interpretations of claims against the estate.

The Eighth Circuit's decision opens insurance insolvencies to adjudication in any number of forums, thereby causing piecemeal litigation which the grant of exclusive jurisdiction was meant to avoid. Insurance insolvency schemes will need to be developed to deal with this change in the liquidation landscape. For these reasons, the Eighth Circuit's decision should be reviewed to provide insurance receivers with a definitive answer on the question of federal jurisdiction over state-regulated insurance insolvencies.

CONCLUSION

For the forgoing reasons, IAIR respectfully requests that this Court grant ProMed's Petition for a writ of certiorari to issue to the United States Court of Appeals for the Eighth Circuit so that this Court may review and decide the questions presented in ProMed's Petition.

Respectfully submitted,

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March 12, 1997